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No. 84-468

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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December 26, 1984

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QUESTIONS PRESENTED

1. Whether mentally retarded persons are a "quasi-suspect" class for purposes of Equal Protection analysis.

2. Whether for Equal Protection analysis, all legislation affecting mentally retarded persons must be tested by an "intermediate" or "heightened" level of scrutiny.

LISTING OF PARTIES

PETITIONERS:

City of Cleburne, Texas
George W. Marti, Mayor of the City of Cleburne
J. T. Bass, Member of the Cleburne City Council
Arval Martin, Jr., Member of the Cleburne City Council
Lonnie Watson, Former Member of the Cleburne City Council, who resigned August 30, 1984
(Replaced Alfred Johns, deceased)
Rita Papajohn, Cleburne City Attorney
(Replaced Susan McMillion, who replaced Robert T. Miller, Jr., who replaced Jim Ferguson)

ATTORNEYS FOR PETITIONERS:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert T. Miller, Jr.
Mary Milford

RESPONDENTS:

Cleburne Living Center, Inc.
(Now known as Community Living Concepts, Inc.)
Jan Hannah
Advocacy, Inc.

ATTORNEYS FOR RESPONDENTS:

Advocacy, Inc.
Renea Hicks
Diane Shisk

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, filed its unpublished Memorandum Opinion — Findings of Fact and Conclusions of Law on October 4, 1982, which is reprinted at Joint Appendix (J.A.) 88. The Judgment, also filed on October 4, 1982, is reprinted at J.A. 111.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed March 5, 1984, reported at 726 F.2d 191, is reprinted at J.A. 112.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed July 6, 1984, consisting of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc and the seven judge dissent thereto with opinions by Justices Garwood and Higginbotham, reported at 735 F.2d 832, is reprinted at J.A. 138. The mandate was issued on July 16, 1984, reprinted at J.A. 145, and on August 27, 1984, the Fifth Circuit entered its Order granting a recall and stay of the mandate until September 27, 1984, which Order is reprinted at J.A. 146.

This Court entered its Order granting the petition for a writ of certiorari on November 13, 1984.

JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 5, 1984. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on July 6, 1984.

On September 22, 1984, Petitioners filed a timely Petition for Writ of Certiorari, and on November 13, 1984, this Court granted the Petition for a Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

U.S. Constitution, Amendment XIV, Sec. 1

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Comprehensive Zoning Ordinance of the City of Cleburne, Texas

Section 3. Districts.

For the purpose of regulating and restricting the use of land and the erection, construction, reconstruction, alteration, moving or use of buildings, structures or land, all land within the corporate limits of Cleburne are hereby divided into fourteen (14) districts with their respective rank from more to less restrictive classification as follows . . .

. . . .

Section 8. District R-3. Apartment house district.

USE REGULATIONS

In District R-3, no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved or altered, except for one or more of the following uses (For exceptions, see Section 16, Special Use Permits; and Section 17, Nonconforming Uses.):

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.
3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels
6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.

8. Philanthropic or eleemosynary institutions, other than penal institutions.

9. Accessory uses customarily incident to any of the above uses. . .

. . . .

Section 16. Special use permits.

Any of the following uses may be located in any district by Special Use Permit of the Governing Body, after public hearing, and after recommendation of the Planning Commission, under such conditions as to operation, site development, parking signs, and time limit as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purposes of this Ordinance[1] . . .

. . . .

4. Nursery schools.

. . . .

9. Hospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.

. . . .

STATEMENT OF THE CASE

This case has its genesis in a zoning dispute arising from the City of Cleburne's requirement and denial of a special use permit to Respondent Jan Hannah for use of property located at 201 Featherston Street as a business consisting of a Level I Intermediate Care Facility for the Mentally Re-

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[1]There are 20 uses for which a special use permit is required. See J.A. 63-65, Pl. Ex. 1, pp. 1190.2-1191, R. Vol. II, pp. 6, 7; J.A. 65-66, Pl. Ex. 1-A, R. Vol. II, pp. 6, 7; and J.A. 67-68, Pl. Ex. 1-B, R. Vol. II, pp. 6, 7, for entire list.

tarded (ICF-MR). Plaintiffs[2] then brought suit to have the City's zoning ordinance declared unconstitutional and included a pendent state claim under Section 7 of the Texas Mentally Retarded Persons Act of 1977 (Tex. Vernon's Ann. Civ. St. art. 5547-300) which they later withdrew when faced with a potential abstention decision from the District Court.[3] (J.A. 12 and 14; and J.A. 84-87).

On June 8, 1965 the City of Cleburne adopted a comprehensive zoning ordinance which divided the City into fourteen (14) districts with a designation of permitted uses within each district. (J.A. 51, Pl. Ex. 1, p. 1162, R. Vol. II, pp. 6, 7). The Ordinance (Sec. 16) also established certain other uses which were subject to the requirement of obtaining a special use permit. (J.A. 63-65, Pl. Ex. 1, R. Vol. II, pp. 6, 7; J.A. 65-66, Pl. Ex. 1-A, R. Vol. II, pp. 6, 7; and J.A. 67-68, Pl. Ex. 1-B, R. Vol. II, pp. 6, 7).

In July of 1980, Respondent Hannah purchased property located at 201 Featherston Street, in the City of Cleburne,

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[2]Plaintiffs consisted of Community Living Concepts, Inc. (formerly Cleburne Living Center, Inc.), Jan Hannah, the Johnson County Association for Retarded Citizens (the 5th Circuit determined it did not have standing) and Advocacy, Inc., a non-profit Texas corporation which, although funded pursuant to 42 U.S.C. § 6012 for the sole purpose of advocating the rights of developmentally disabled persons, represented and litigated the individual damage claims of Hannah and Cleburne Living Center in this cause. There were no developmentally disabled or mentally retarded persons who appeared as Plaintiffs in this suit. (J.A. 4-5, 88-89 and 95).

[3]Petitioners also alleged claims under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and a request for curtailment of the City's federal revenue sharing funds under the State and Local Assistance Act of 1972 (31 U.S.C. § 1221, *et seq.)*, recodified at 31 U.S.C. § 6701, *et seq.* (J.A. 11-12). Both the District Court and the 5th Circuit Court of Appeals have denied Respondents any relief under these claims, and they have not been brought forward to this Court by a cross-petition for certiorari from Respondents. (J.A. 99-100; and J.A. 120-121).

for the purpose of leasing it to Respondent Cleburne Living Center, Inc. (CLC), a profit-making Texas corporation, which planned to establish a business consisting of an ICF-MR facility at that location to provide "habilitation services" to thirteen mentally retarded persons in the moderate to mild range of mental retardation.[4] (J.A. 7; R. Vol. II, p. 60; and Pl. Ex. 7, R. Vol. II, pp. 6, 7).

The City required Respondents to obtain a special use permit since the property is zoned R-3 pursuant to Section 8 of the ordinance which permits various forms of multiple zoning dwelling units at a location, such as apartment houses and boarding houses, but specifically excludes "Hospitals, sanitariums, nursing homes or homes. . . . for the insane or feeble-minded or alcoholics or drug addicts" unless a special use permit is obtained pursuant to Section 16 of the Ordinance which requires these facilities to secure a special use permit. The City's Ordinance is in compliance with the Texas Department of Human Resources regulations for ICF-MR facilities requiring that such a facility be located in an incorporated city which is subject to special use permit requirements, local zoning and/or occupancy code requirements. (J.A. 79-80, Def. Ex. 10, R. Vol. III, p. 304).

On July 28, 1980, Respondent Hannah applied to the City for a special use permit. (J.A. 91). The house at 201 Featherston was a 2510 square foot one-story frame house that had only four bedrooms and two baths (a half-bath to be added), with a small unfenced yard located directly across the street from a junior high school. (J.A. 92; J.A. 46; and J.A. 83, Def. Ex. 12, R. Vol. III, p. 347). Respondent CLC planned to house thirteen mentally retarded adult men and women,

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[4]Respondent Hannah is also CLC's Vice-President and owns one-third of the corporation's outstanding stock. (R. Vol. II, pp. 123 and 170).

along with necessary support staff, at this location. (J.A. 92 and 93). On August 18, 1980, the City's Planning and Zoning Commission held a hearing and then denied the special use permit. (J.A. 91). On October 14, 1980, the City Council of Cleburne held a public hearing on the special use permit application and voted, three to one[5], to deny the special use permit (J.A. 92) after considering the following factors (J.A. 95):

1. The size of the home and the number of people to be housed; (J.A. 24, 25, 26 and 29).
2. The location of a junior high school across the street from 201 Featherston;[6] (J.A. 25, 26, 29 and 30).
3. The home's location on a five hundred (500) year flood plain, (J.A. 28).
4. Concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take; (J.A. 25).
5. Concern for the fears of elderly residents of the neighborhood; (J.A. 29).
6. The attitude of a majority of owners of property located within two hundred (200) feet of 210 Featherston; (J.A. 25 and 29).
7. In general, the presentation made before the City Council. (R. Vol. II, p. 15).

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[5]Of the three City Councilmen who voted against the permit, Alfred Johns was a black American (J.A. 28), who had been on the Board of Directors of the C. C. Cook Developmental Center, a school for the mentally retarded, for three years (J.A. 26), and Arval Martin had a mentally retarded granddaughter. (J.A. 30).

[6]There was another location in the City of Cleburne which was located on an off street affected by less traffic which City officials felt was more appropriate for an ICF-MR facility for thirteen unrelated mentally retarded adult men and women. (J.A. 45).

The District Court applied the rational basis test to the Ordinance, as written and as applied, and found it to be rationally related to legitimate purposes and interests of the City of Cleburne. (J.A. 103). Furthermore, the City's actions were found not to be arbitrary, capricious or irrational. (J.A. 103).

The 5th Circuit determined that no fundamental interest was involved but established that mentally retarded persons were a "quasi-suspect" class for Equal Protection analysis and, therefore, applied an "intermediate" level of scrutiny, requiring that the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives, to the review of the ordinance. While the panel found that the interest asserted by the City was substantial in nature, it found that there was not the required substantial nexus between the asserted interests and the Ordinance, and, therefore, held that the Ordinance violated the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The mentally retarded are not a "quasi-suspect" class for Equal Protection analysis because they do not meet the indicia of "suspectness" which is necessary to accord that status to a group. Mentally retarded men and women are individuals who do not constitute a "discrete and insular minority," and whose disability while immutable, is related to the stereotypical thinking associated with the mentally retarded as a group. Nor are they a politically powerless group subjected to prejudice. The last thirty-five years have produced genuine concern and understanding of the condition of the mentally retarded and have ignited a wellspring

of political advocacy as well as legislation designed to protect the rights of the mentally retarded.

The Ordinance which requires the owners of a business such as an intermediate care facility for the mentally retarded to obtain a special use permit to operate such a profit-making facility is rationally related to legitimate objectives of the City of Cleburne. The denial of the request for a special use permit to operate the care facility by the members of the Cleburne City Council was based on their determination that the location and structure were inappropriate to house thirteen unrelated mentally retarded men and women and two full-time staff members and was rationally related to legitimate purposes and interests of the City of Cleburne.

The Fifth Circuit's decision in this case jeopardizes state, local and federal legislation intended to benefit the mentally retarded by failing to recognize that the mentally retarded are different from the rest of society and should be accorded different treatment. The decision below also is contrary to the decision of this Court in *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984), and the principles established by this Court's decisions in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562 (1976), and *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982).

ARGUMENT

I. THE MENTALLY RETARDED DO NOT POSSESS SUFFICIENT INDICIA OF "SUSPECTNESS" TO BE A "QUASI-SUSPECT" CLASS

The Fifth Circuit has held that the City of Cleburne's zoning ordinance, as written and as applied, denies mentally retarded individuals their rights to Equal Protection. This Court has determined that "[t]he Equal Protection Clause was intended as a restriction on state legislative action with elemental constitutional premises." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982).

In analyzing a legislative classification as the basis of an Equal Protection claim, it is necessary for a court to determine if the classification impinges upon a fundamental right. The Fifth Circuit found that the Respondents did not identify any fundamental rights that were impaired by the Cleburne Ordinance. (J.A. 123). Furthermore, this Court has determined that the mentally retarded do not have a fundamental right to residential placement. See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981).

If a court is satisfied that a fundamental right has not been impinged, its Equal Protection analysis then shifts to whether the ordinance or statute, as written and as applied, involves a "suspect" or "quasi-suspect" classification. If either the exercise of a fundamental right is impinged or a classification disadvantages a "suspect" class, strict scrutiny is applied by the courts in determining whether a "classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe, supra*, 457 U.S. at 217. The Fifth Circuit, however held that mental retardates do not constitute a "suspect" class. (J.A. 125). There-

fore, the focus of a court shifts to an analysis of whether mentally retarded individuals should be accorded "quasi-suspect" status, with attendant "intermediate" or "heightened" scrutiny. In order to withstand "intermediate" scrutiny, a statutory classification which affects a "quasi-suspect" group "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457 (1976). If neither a fundamental right is involved nor is "suspectness" or "quasi-suspectness" attributed to a group, then a legislative classification is scrutinized at the rational basis level, which the District Court applied to the City of Cleburne zoning ordinance, and found to pass constitutional muster on the basis that the "zoning ordinance as written and as applied to the Respondents, is rationally related to legitimate purposes and interests of the City of Cleburne." (J.A. 103). See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40, 55, 93 S.Ct. 1278, 1300, 1308 (1973).[7] The District Court also determined that the Ordinance "is not arbitrary, capricious or irrational." (J.A. 103).

"Quasi-suspectness" is a term not easily susceptible to or capable of definition, but is an evolving concept which the courts have attempted to determine on a case by case basis. While it is unclear which precise criteria determine "quasi-suspect" status, the courts have borrowed the criteria or indicia of "suspect" status to decide whether a class is entitled to "quasi-suspect" status. This Court has extended

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[7]The Supreme Court of Georgia affirmed the decision of the Georgia Superior Court in its application of the rational relation test to the resolution (ordinance), even though the "Resolution does contain separate classifications for mentally ill or retarded individuals." *Macon Association for Retarded Citizens, supra*, 314 S.E.2d at 221.

"quasi-suspect" status to classifications based on gender[8] and on occasion to illegitimacy.[9] However, it is unclear as to which criteria are relevant in determining "quasi-suspect" status and how much weight they should be given.

This Court has focused upon four primary indicia of "suspectness," some of which must be present to accord "quasi-suspect" status to a particular group or class. First, this Court has examined whether the class is a "discrete, insular minority" referred to in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, 58 S.Ct. 778, 783-784, n.4 (1938). Second, this Court has asked whether the classification is based on immutable characteristics. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973). Third, the Court tries to determine if the class has been "subjected to a history of purposeful unequal treatment." *San Antonio Independent School District v. Rodriguez*, *supra*, 411 U.S. at 28. Finally, the Court seeks to answer the question whether the class has been "relegated to ... a position of political powerlessness." *Rodriguez*, *supra*, 411 U.S. at 28.

THE MENTALLY RETARDED ARE NOT A "DISCRETE, INSULAR MINORITY"

Mentally retarded persons are not within the scope of a "quasi-suspect" class because they do not constitute a "discrete, insular minority" as envisioned by this Court in *Carolene Products*, *supra*. *Webster's Third New Inter-*

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[8] *Craig v. Boren*, *supra*, 429 U.S. at pp. 197-199 (1976).

[9] This Court has held that past discrimination against illegitimates justified "quasi-suspect" status. *Matthews v. Lucas*, 427 U.S. 495, 505-506, 96 S.Ct. 2755, 2762-2763 (1976). However, this Court applied the rational relation test to illegitimates in *Labine v. Vincent*, 401 U.S. 532, 537-539, 91 S.Ct. 1017, 1020-1021 (1971).

national Dictionary of the English Language Unabridged, 1981 edition, defines the word, "discrete," as "possessed of definite identity or individuality: constituting a separate entity: detached or separate" and as "distinct." "Insular" is defined in the same publication as "insulated, isolated, [or] detached." "Mental retardation" is defined by the American Association on Mental Deficiency as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period [before the age of 18]." (Pl. Ex. 27, pp. 2 and 5, R. Vol. III, p. 287, 288). Dr. Phil Roos defined "mental retardation" as essentially a problem of learning manifested in difficulty with abstract thinking, judgment, problem solving and retention, and which includes problems of social adjustment and economic productivity. (J.A. 37-38). It is a varied condition ranging from mildly and moderately retarded to severely and profoundly retarded with IQ as the basic measurement device as well as adaptive behavior and medical classification. (J.A. 38). Mild mental retardation, which is the mildest level of mental retardation, includes those individuals whose intelligence is between an IQ of 50 and an IQ of 70, and constitutes approximately 89% of all mentally retarded persons. (J.A. 39). Moderate mental retardation includes those with IQ's of roughly 35 to 50 and constitutes roughly 5% of the mentally retarded population. (J.A. 39).

Therefore, it would be necessary to subject an individual to IQ tests to determine if he or she were in the protected class. Those with an IQ of 69 or less would become part of a "quasi-suspect" specially protected class, and those with an IQ of 70 or more would not qualify for this special solicitude from the courts. To further complicate any determination as

to whom "quasi-suspectness" should be granted, the *Manual for Training of Surveyors in Assessing Active Treatment as Required by the Federal Regulations for Intermediate Care Facilities for Mentally Retarded Persons (45 CFR 249.13)*, (Pl. Ex. 27, R. Vol. III, pp. 287, 288), states at p. 3 that

> IQ is *not* an *immutable* number that emerges in precise and automatic fashion from the administration of an intelligence test. Each IQ score must be interpreted by a trained and experienced examiner, considering all the facts that may have influenced the person's performance on the test, including associated sensory and motor dysfunctions. (emphasis supplied).

Furthermore, there is no one standardized IQ test to measure intelligence. In fact, the American Association on Mental Deficiency (AAMD) classification system for degrees of retardation in measured intelligence recognizes different maximum IQ levels which constitute the outer parameters of mental retardation.[10]

The second major aspect of the definition of mental retardation concerns "adaptive behavior," which means how well or to what degree the individual has acquired, and uses, skills necessary for independent living. (Pl. Ex. 27, p. 3, R. Vol. III, pp. 287, 288). Just as with the measurement of intelligence, there are also different scales for measuring adaptive behavior, among the most widely used of which are the AAMD Adaptive Behavior Scale and the Vineland Social Maturity Scale. (Pl. Ex. 27, p. 3, R. Vol. III, pp. 287, 288). As an example of what is meant by adaptive behavior, the AAMD scale covers eating, dressing, toileting, and other

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[10]Mild retardation registers on the Wechsler IQ scale from 69-55 and on the Stanford-Binet IQ scale from 68-52. (Pl. Ex. 27, p. 3, R. Vol. III, pp. 287, 288).

self-help skills, sensorimotor development, money handling skills, language development, number and time concepts, occupation, self-direction, responsibility and social skills; and the Vineland scale includes self-help skills, self direction, occupation, communication, locomotion, and socialization. (Pl. Ex. 27, p. 4, R. Vol. III, pp. 287, 288). However, although adaptive behavior is also classified as mild, moderate, severe, or profound, measures of adaptive behavior are less standardized than tests of intelligence, and it is not possible to specify scores for these levels. (Pl. Ex. 27, pp. 3, 4, R. Vol. III, pp. 287, 288). As with the IQ, a single-score measure of adaptive behavior would in any event, be of no use in planning a program for a mentally retarded individual. (Pl. Ex. 27, p. 4, R. Vol. III, pp. 287, 288). Thus, those individuals with certain levels of adaptive behavior below a certain level would qualify for "quasi-suspect" solicitude from the courts while those above that level would not.

Mild retardation, which as already noted includes 89% of all mentally retarded persons, is hardly discernible on informal contact, unlike race or gender which is immediately discernible. (J.A. 39). Some mentally retarded can become self-sufficient, economically productive members of society, in fact, most become "invisible" after they leave school, whereas, at the other end of the spectrum many of the profoundly retarded are devoid of any degree of self-sufficiency and require institutionalization. (J.A. 39). This description given by Dr. Roos is a far cry from the "discrete, insular minority" envisaged by this Court in *Carolene Products, supra.* Mentally retarded persons are in reality a "large, diverse and amorphous class" and as such they do not qualify for "quasi-suspect" status. See *Rodriguez, supra,* 411 U.S. at 28.

THE CHARACTERISTICS OF THE MENTALLY RETARDED ALTHOUGH IMMUTABLE ARE RELEVANT TO LEGISLATIVE CLASSIFICATION

Neither should the mentally retarded be accorded "quasi-suspect" status because mental retardation is basically an immutable characteristic.[11] Mental retardation has been defined as a problem of a deficit in intellectual development and social adaption. (J.A. 38). However, for those very reasons mental retardation is a legitimate classification for legislative purposes. The fact is that "[t]he importance of immutability as an indicium of suspectness should not . . . be overrated. . . . Immutability therefore cannot serve as a touchstone of suspectness.[12] One constitutional authority has stated that "[f]orbidding blind people to pilot airplanes will do little to encourage eyesight, but such a prohibition will obviously stand nonetheless, since the classification fits perfectly a different goal."[13] Similarly, the stereotypical characteristics of the mentally retarded dealing with a reduced ability to learn and lack of social adaptation are relevant to legislative classifications which govern the care of the mentally retarded. These characteristics of the mentally retarded reduce their ability to care for themselves so they are relevant to legislative classifications.

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[11]Dr. Phil Roos testified that mental retardation traditionally is irreversible but that there may be some amelioration of the condition. (J.A. 38).

[12]*Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model,* 90 Yale L. J. 912, 918 (1981).

[13]John H. Ely, *Democracy and Distrust: A Theory of Judicial Review,* (Cambridge, Massachusetts: Harvard University Press, 1980), p. 155; Michael J. Perry has written in his article entitled *Modern Equal Protection: A Conceptualization and Appraisal,* 79 Columbia L.Rev. 1023, 1066 (1979), that "No one would argue, for example, that a person irremediably blind from birth ought to enjoy the same opportunity to drive a car as anyone else."

This legislative concern of the City of Cleburne for the care of those possessing lesser intelligence and social adaptation is likewise reflected in the City's requirement that those who wish to operate a nursery school for children must also obtain a special use permit. (J.A. 68, Pl. Ex. 1, p. 1190.2, R. Vol. II, pp. 6, 7). Any person who has mentally retarded children (even if they are now adults) or children who are not mentally retarded, may live with those children in any zoning classification in Cleburne; however, if that same person goes into the business of keeping other mentally retarded adults and rendering "habilitation services" under a Medicaid contract, such person must run that business in the properly zoned area in structures that are appropriate. Likewise, if a person goes into the business of keeping children of others, as distinguished from his own, such person must conduct that business in an area that is properly zoned with appropriate facilities. Therefore, Jan Hannah, a businesswoman, was required to obtain a special use permit from the City of Cleburne to care for and keep the mentally retarded and render "habilitation services" to them at 201 Featherston St.

In holding that the mentally retarded constitute a "quasi-suspect" class, the Fifth Circuit panel totally ignored the relationship of the disability to the stereotypical thinking associated with mentally retarded persons, which Judge Garwood termed the "threshold requirement for scrutiny beyond the rational basis level". (J.A. 142). In other words, to establish this threshold requirement, the panel should have determined whether the class of the mentally retarded lacks a

> significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either gen-

> erally or in respect to the regulatory area under consideration.

(J.A. 142). Distinctions based on sex and on occasion legitimacy come within the ambit of "quasi-suspectness" for Equal Protection analysis and are "generically different" from a classification based on mental retardation. (J.A. 139). Judge Garwood is entirely accurate in his statement that the mentally retarded "*are* materially different from the rest of society, and are so as a result of their class-defining characteristics." (emphasis in the original). (J.A. 140). Treating mentally retarded people normally will not make them normal. (J.A. 41).

As this Court observed in *Frontiero v. Richardson, supra,* 411 U.S. at 686:

> . . . what differentiates sex from such *non-suspect statuses as intelligence or physical disability,* and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.* (emphasis supplied)

Subsequently, in *Murgia, supra,* 427 U.S. at 313, this Court again made reference to the relationship of the stereotype characteristic to the actual ability, holding that age did not constitute a "suspect" class and applied the rational basis test.[14] The Third Circuit heeded the *Frontiero* and *Murgia* decisions in deciding that mentally ill persons were not a "suspect" class in *Doe v. Colautti,* 592 F.2d 704 (3rd Cir.

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[14]The Fifth Circuit notes that the Cleburne Ordinance discriminates between the mentally retarded and the elderly who also require supervision but for whom group homes may be established in an R-3 district without a special use permit. See J.A. 125-126. This comparison of two divergent groups such as the elderly and the mentally retarded is, of course, inaccurate, because these groups have a different set of needs and impact the neighborhood differently.

1979). Although mental retardation is a totally different disability than mental illness, the rationale of the relationship between the actual disability and the stereotype characterization is applicable to the mentally retarded. The Eighth Circuit, in *Fowler v. U.S.*, 633 F.2d 1258 (8th Cir. 1980), acknowledged the relevance of a legislative classification of the mentally retarded for employment purposes and only applied a rational basis review to the U.S. Government Civil Service regulations regarding the mentally retarded. In addition, the court in *Upshur v. Love*, 474 F.Supp. 332, 337 (N.D. Cal. 1979), relied upon *Murgia* in determining that the visually handicapped were not entitled to "suspect" status because "classifications based on blindness often can be justified by the different abilities of the blind and the sighted." On this basis, the district court applied the rational basis test even though the "blind are a small, politically weak minority that has been subjected to varying forms of prejudice and discrimination." *Upshur, supra.*

ATTITUDES HAVE CHANGED TOWARD THE MENTALLY RETARDED

The third indicia of "suspectness" deals with whether the mentally retarded have experienced a "purposeful history of past discrimination." The panel based its finding of historical prejudice and political powerlessness on conditions that existed in the first half of the century but that have since ceased to exist or changed dramatically since 1950. Dr. Phil Roos testified that while mentally retarded persons may not have been well treated in the past, this is no longer the situation:

Q. What happened in 1950?

A. A number of things — a presidential panel on mental retardation was established, which later became the

President's Committee on Retardation, which became a strong and viable advocate for retarded persons at the national level. Our own association, the Association for Retarded Citizens, was founded in 1950, and became a very strong consumer advocate voice in the nation. A new philosophy began to permeate the field of mental retardation and other disabilities; consumerism became an important force.[15]

* * *

Q. Well, has the public a good understanding of mental retardation today?

A. It has improved in the last few years. This has been due in part to media coverage, and to the picturing of mentally retarded people through the media as real, genuine human beings.[16]

There is a difference between discrimination that is harmful to the mentally retarded individual against whom discrimination is practiced and the lack of additional benefits received by that mentally retarded individual to compensate for his or her handicap. The mentally retarded no longer exist in the negative discriminatory stage of thirty-five years ago. They now have entered the additional benefit stage which is being handled legislatively.

Also essential to an analysis of discrimination is the concept of whether or not the stereotypical characteristics of the mentally retarded reflect accurately on the ability of the mentally retarded to perform. The mentally retarded *do* have a reduced ability to perform and contribute to society as has already been discussed. This concept has prevented other groups such as the aged, *Murgia, supra*, and the mentally ill, *Doe v. Colautti, supra*, from establishing themselves as "quasi-suspect" groups.

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[15] J.A. 40.

[16] J.A. 40.

THE MENTALLY RETARDED ARE NOT A POLITICALLY POWERLESS GROUP

Likewise, the mentally retarded are not a politically powerless group. This fact is evidenced by the various legal reforms concerning the rights of the mentally retarded that have occurred in many states as well as by the enactment of federal legislation aimed at continually improving the conditions of the handicapped. See Tex. Vernon's Ann. Civ. St. art. 5547-300 (Texas Mentally Retarded Persons Act of 1977)[17]; 29 U.S.C. § 794 (the Rehabilitation Act of 1973); 20 U.S.C. § 1401, *et seq.* (The Education for All Handicapped Children Act); 42 U.S.C. § 6000, *et seq.* (The Developmental Disabilities Services and Bill of Rights Act); 42 U.S.C. § 1396d(d) and § 1397 (Social Security Amendments of 1974); and Department of Transportation and Related Agencies Appropriation Acts, 1975-1984. Additionally, 22 states have enacted statutes mandating in various ways and degrees the location of community homes in residential areas.[18]

The proliferation of advocacy and representative groups for the handicapped bears witness to their growing political

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[17]The legislature of the State of Texas has provided for the protection of the rights of the mentally retarded in the Mentally Retarded Persons Act of 1977 (Vernon's Ann. Civ. St. art 5547-300) including the "right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate for the individual's needs." Section 15. The Respondents, in fact, alleged violations of this Act in their Original Complaint; however, they opted to no longer pursue these pendent state claims and voluntarily dismissed them when faced with possible abstention by the district court. (J.A. 84-87).

[18]Roberto, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"* 28 Wayne L. Rev. 1349, 1378 (1982).

power. In the case at bar two such groups are interested — Advocacy, Inc., a legal advocacy group funded under 42 U.S.C. § 6012 (acting both as an attorney for this business corporation and as a plaintiff), and the Johnson County Association for Retarded Citizens, which does not have standing in this case. These legislative acts are evidence of the fact that needs of the mentally retarded have been and should be addressed legislatively rather than by the judiciary. The commentators are legion in their espousal of the legislative approach over the clearly less preferred litigious constitutional approach in promoting and protecting the rights of the handicapped, including the mentally retarded.[19] Indeed, this Court has held that courts "ought not to pass on questions of Constitutionality . . . unless such adjudication is unavoidable." *Harris v. McRae*, 448 U.S. 297, 307, 100 S.Ct. 2671, 2683 (1980).

Respondents are asking the courts to accomplish that which the City Council of Cleburne and the Congress of the United States have declined to do. This Court has held that 42 U.S.C. § 6010 does not create substantive rights for the mentally retarded. *Pennhurst, supra*, 451 U.S. at 20.

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[19]Johnson, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 Ohio No. L. Rev. 64 (1980); Roberto, *Can the Mentally Retarded Enjoy "Yards that are Wide?"*, 28 Wayne L. Rev. 1349 (1982); Reiner, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W.Va. L. Rev. 669 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. Rev. L. & Soc. Change 137 (1975).

II. THE RATIONAL BASIS LEVEL OF REVIEW SHOULD BE APPLIED TO LEGISLATION AFFECTING THE MENTALLY RETARDED

The Equal Protection Clause requires that all persons similarly situated be treated alike, but it does not require "things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882 (1940). The initial discretion to determine what is "different" and what is the "same" resides in the governing body of a governmental entity which must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private and that account for limitations on the practical ability of the governmental entity to remedy every ill. *Plyler v. Doe*, *supra*, 457 U.S. at 216.

The enactment of reasonable zoning regulations constitutes a proper exercise of a city's police power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). The City of Cleburne was granted the power to zone by Tex. Vernon's Ann. Civ. St. art. 1011a, and art. 1011b authorized the City Council to divide the City into zoning districts. The Texas Supreme Court has determined that these grants of authority to the cities are valid exercises of police power and are constitutional. *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex.1934). This Court has held its "scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives." *Foley v. Connelie*, 435 U.S. 291, 296, 98 S.Ct. 1067, 1070 (1978)[20]

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[20]This holding reflects a noticeable trend in this Court's decisions away from strict judicial scrutiny to a rational level of review regarding restraint upon classifications dealing with aliens.

The City's Comprehensive Zoning Ordinance specifically regulates the "density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes." (J.A. 49-50, Pl. Ex. 1, p. 1153, R. Vol. II, pp. 6, 7). The purposes of the City's Ordinance include: the lessening of congestion in the streets, securing safety from fire and other dangers and the avoidance of undue concentration of population and protection of the health, safety and general welfare of its City's population; all of which are permissible City objectives. *Village of Euclid, supra,* and *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536 (1974). (J.A. 50, Pl. Ex. 1, p. 1154, R. Vol.II, pp. 6, 7).

Certainly, the City has a legitimate interest in the location and the appropriateness of the structure for an ICF-MR facility established to provide "habilitation services" and residential care under a Medicaid contract for mentally retarded persons. Its interest extends not only to the well being of the residents of the home but to the interests of the surrounding neighbors, which the City must balance. See *Village of Belle Terre, supra.* The Supreme Court of Ohio articulated this balance of interests in *Garcia v. Siffrin Residential Association,* 407 N.E.2d 1369, 1375 (1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1349 (1981):

> It may not be reasonably questioned that there is considerable merit in a law which seeks to maximize the assimilation of mentally retarded persons into the ordinary life of the community in which they live, and to provide places for them to live in surroundings and circumstances as close to normal as possible. However, in carrying out these salutory state programs in aid of some of our citizens, the Constitutional rights of other members of our citizenry, and the Constitutional author-

ity which has been granted to our local governments, must always be guarded and not infringed upon.

It cannot be forgotten that the proposed home is a business, and although it, like any business, provides a service to its customers, it exists for the purpose of profiting from its customers, which in this case are mentally retarded persons.

Jan Hannah presently owns the property and house at 201 Featherston for which she paid $59,000. (R. Vol. II, p. 172). She had leased the property to the Cleburne Living Center, Inc., of which she is the vice-president, for the amount of $15,600 a year, or $1,300 per month. (R. Vol. II, pp. 170, 172) and (Pl. Ex. 7, R. Vol. II, pp. 6, 7). See (J.A. 96-97). Cleburne Living Center, Inc. planned to charge any mentally retarded resident who moved into the proposed facility at 201 Featherston the state per diem rate at that time of $48.10 a day, which with thirteen residents amounts to $625.30 a day and $228,234.50 a year. (R. Vol. II, p. 126). It is these alleged loss of "profits" for which Respondents Hannah and Cleburne Living Center, Inc. brought suit.

The Ordinance in question is directed to where the business of providing a group home for the mentally retarded may be established and in what kind of a building the business may be established, not to where mentally retarded persons may live within the City of Cleburne. The home may be located anywhere in the City by means of a special use permit. (J.A. 62, Pl. Ex. 1, p. 1190.1, R. Vol. II, pp. 6, 7). In fact, Councilman J. T. Bass testified that he would have no objections to a facility for the care of the mentally retarded in Cleburne if it were in a proper location and in a facility that was adequate. (J.A. 24). However, the appropriateness of this structure and particular location for

housing thirteen mentally retarded adult men and women and two full-time staff employees was a factor in the decision of the members of the City Council of Cleburne to deny Jan Hannah a special use permit for the house at 201 Featherston St. The District Court found that "the size of the home and the number of people to be housed" was a factor which entered into the decision of the City Council members to deny the special use permit request. (J.A. 95).

The District Court's finding was based on the testimony of City Councilman Alfred Johns, who stated that one of the reasons he voted to deny the special use permit was because he did not think the property was large enough for the requested facility at 201 Featherston St. (J.A. 25), and because he did not think the property was large enough to afford recreation for at least thirteen mentally retarded persons, (J.A. 26). City Councilman Arval Martin also stated that the location of a facility for the mentally retarded was inappropriate because the yard was too small. (J.A. 29). City Councilman J. T. Bass also testified that the property was not adequate for the use it was intended, including very little yard space and no recreation facilities. (J.A. 24).

The District Court also decided in its Finding of Fact 34 that the proposed home's location in a 500 year flood plain was another factor in the Councilmen's decision to deny Hannah's request for a special use permit. (J.A. 95). This was an important consideration to Councilman Johns. (J.A. 28). Councilman Arval Martin testified that busy traffic at the junior high school across the street from the proposed facility was a consideration of his in denying the special use permit. (J.A. 29). In fact, Jan Hannah and the other shareholders of Cleburne Living Center, Inc. considered purchasing a house at a more appropriate location in Cleburne near

a hospital and doctor's office on an off street with less traffic. (J.A. 45 and 47). However, Jan Hannah did not pursue this location because she did not consider it financially feasible. (J.A. 47). The District Court also determined that the location of a junior high school across the street from 201 Featherston was a factor in the decision of the Council to deny a special use permit. (J.A. 95).

The City of Cleburne Ordinance only establishes a permitted land use at a specific location; it does not confer appropriateness for that use on whatever structure may exist at that location. The structure at 201 Featherston St. is nothing more than a 2510 square foot frame house with four bedrooms and two baths and as such it could not function as a boarding house, a permitted use, for fifteen unrelated adult men and women. (See J.A. 46; and J.A. 82, Def. Ex. 12, R. Vol. III, p. 347). The Ordinance does not confer on this structure the required characteristics of a boarding house or a hospital, which is also a permitted use for this location. The inherent requirements of the intended use of a structure, not the zoning permission, are the determinant factors in establishing the appropriateness of the structure in question. In some instances, the City determines that a structure is appropriate for its intended use by means of its building code and occupancy permits, and in certain other instances, such as nursery schools and residential care facilities for the mentally retarded, the special use permit is the City's mechanism to determine the appropriateness of the intended use of a structure such as the house at 201 Featherston St.[21] The denial of the special use permit did not establish that a residential facility

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[21]See J.A. 62, Pl. Ex. 1, p. 1190.1, R. Vol. II, pp. 6, 7; and J.A. 49-50, Pl. Ex. 1, pp. 1153-1154, R. Vol. II, pp. 6, 7.

for mentally retarded persons could never exist at 201 Featherston St. at all; rather, it established that under the facts presented to the City Council, the location coupled with the structure located thereon rendered it inappropriate for the intended use of housing thirteen mentally retarded unrelated adult men and women and two full-time Cleburne Living Center employees. It has nothing to do with discrimination. For example, if the site had been built up with fill, the objection regarding the flood plain would have been cured. If the house were larger or the number of people smaller, the overcrowding objection would have been cured.

The Ordinance and its objectives in the instant action[22] are very much the same as those held constitutional in *J. W. v. City of Tacoma, Washington*, 720 F.2d 1126 (9th Cir. 1983). Therefore, this Court should hold that there is a sufficiently close connection between the legislative goal and the Ordinance's means of achieving it and adopt the same stance which the Ninth Circuit Court of Appeals took in holding that the Tacoma Ordinance was constitutional as written:

> The use permit scheme is a rational method of ensuring that group homes with former mental patients do not, because of the special characteristics of their residents, interfere with these interests.

Id. at p. 1130.

Key to the Fifth Circuit's decision in finding the lack of necessary relevance of the Ordinance to the City's goals

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[22]The Ordinance requires the property owner who desires to operate an intermediate care facility for the mentally retarded to obtain a special use permit in order to operate the facility based on the objectives of the City Ordinance. See J.A. 131. This requirement passes constitutional muster because it is rationally related to legitimate purposes and interests of the City of Cleburne, and is not arbitrary, capricious or irrational. (J.A. 103).

was the panel's assumption that because the property in question was located in an apartment district, "the same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." (J.A. 131-132). First, it is stretching rationality to believe that fifteen unrelated adult men and women could or would live in a 2510 square foot boarding house with only four bedrooms and two bathrooms. This statement is also erroneous because if a boarding house were operated at that location, a mentally retarded person would be free to move into that boarding house. However, the reason that mentally retarded persons who qualify for habilitation training under Medicaid would not move into the house would be because they are not capable of independent living like non-mentally retarded boarders. They require something different. In fact, for a parent or guardian to simply place one of the potential residents of an ICF-MR facility in a boarding house would result in one or more of the following problems:

1. The mentally retarded boarder probably would not be able to maintain a steady job and, therefore, pay the rent.
2. The mentally retarded boarder could not conform to the behavioral norms of the other non-retarded boarders.[23]

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[23]Indeed, Mrs. Bobbie Northrup, who holds the position of secretary in the Cleburne Living Center, Inc., and currently resides at 201 Featherston, apparently recognized that the mentally retarded are subject to different norms than the non-retarded when she asked a police officer to put a mentally retarded resident of a nearby ICF-MR facility in Keene, Texas, also operated by Community Living Concepts, Inc., (R. Vol. II, p. 170) in a patrol car to scare him because he had been defying her all day. (R. Vol. III, p. 336).

3. The mentally retarded boarder could not keep his room clean.

4. The mentally retarded boarder could not care for himself.

5. The mentally retarded boarder could not cope with any emergency such as a flood or fire which affected the house.

If the mentally retarded person could meet the above requirements, he or she would not qualify for care in an ICF-MR facility.

The very legislation which established funds for, and regulates the adequacy and size of the Intermediate Care Facilities for the Mentally Retarded (ICF-MR), such as the proposed one at 201 Featherston, in effect recognizes that a mentally retarded person who would qualify for "habilitation services" in an ICF-MR facility could not function as a boarder in a boarding house without detailed provisions for his or her habilitation, treatment, care, and maintenance. An ICF-MR facility does not even fall within the Ordinance's definition of a "boarding" or "lodging" house which is:

> A building other than a hotel, occupied as a single housekeeping unit, where lodging or meals are provided for five or more persons for compensation, pursuant to previous arrangements but not for the public or transients.[24]

Whereas by definition the purpose of an ICF-MR facility is to provide training and "habilitation services" for its res-

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[24](Pl. Ex. 1, p. 1155, R. Vol. II, pp. 6, 7).

idents. These facilities are considered "*institutions*," rather than residences, by the Texas Department of Health.[25]

The State as well as the Cleburne City Council is concerned with the number of occupants to be housed in an ICF-MR facility and has limited the number of residents to a maximum of six. Furthermore, these regulations also require that the facility be located in an incorporated city which is *subject to special use permit requirements*, local zoning and/or occupancy code requirements. (J.A. 36; and J.A. 79-80, Def. Ex. 10, R. Vol. II, pp. 6, 7). Respondents planned to house thirteen residents in order to satisfy their profit requirements. (J.A. 60).

Therefore, to simply place a mentally retarded person in the house at 201 Featherston as a boarder, could in reality be detrimental to that individual. The failure to treat the mentally retarded in a different manner than the non-mentally retarded ultimately discriminates against the mentally retarded and deprives them of the habilitation, care and training which they so badly need to make themselves healthy and productive citizens of this country. This concept has a firm foundation in legislation, e.g., 20 U.S.C. § 1401, *et seq.* (Education for All Handicapped Children Act), and the seminal case of *Board of Education of the Hendrick*

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[25]Pl. Ex. 25, p. 1, R. Vol. III, 290, Minimum Licensing Standards for Facilities Serving the Mentally Retarded Citizens of Texas: ". . . for the habilitation of individuals based on an active treatment program in institutions of the character defined and covered herein."

Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).[26]

The mentally retarded adults who would be placed in the Cleburne home are unable to learn independent skills in schools or in the institutions from which they would come; that is why they would be placed in this habilitation home under a Medicaid contract with the State. The members of the Cleburne City Council determined the location at 201 Featherston to be inappropriate for the purpose of habilitation of thirteen unrelated retarded men and women who failed to learn independent living skills prior to reaching adulthood and two staff members.

The handicap of the mentally retarded person, per se, requires different treatment from the norm, e.g., handicapped accessibility, specialized education, and appropriate treatment, services and habilitation. In fact, if they cannot be treated differently, it would not be possible for the State to provide the Medicaid assistance so they can live in a habilitation facility. However, the Fifth Circuit's establishment of the mentally retarded as a new cognizable "quasi-

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[26] In addition, Congress has promulgated 42 U.S.C. § 6000, *et. seq.* (Developmental Disabilities Services and Bill of Rights Act), which established a federal-state grant program and requires that persons with developmental disabilities have " a right to appropriate treatment, services and habilitation" which "should be provided in the setting that is least restrictive of that person's personal liberty." Department of Transportation and Related Agencies Appropriation Acts, 1975-1984, require that an applicant for federal financial assistance provide certain facilities and services to the disabled. Congress also provided for the establishment of intermediate care facilities and related services for the mentally retarded in 42 U.S.C. § 1396d(d) and 1397 (Social Security Amendments of 1974). Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) provides handicapped individuals with a vehicle to combat discrimination, exclusion, or denial of benefits under any program or activity receiving federal financial assistance.

suspect" class may place in jeopardy the application of the heretofore mentioned federal and state laws protecting the handicapped, including the mentally retarded. By entitling the mentally retarded to a "heightened" level of judicial scrutiny and "quasi-suspectness," the Fifth Circuit's opinion could emasculate the heretofore mentioned laws which protect the handicapped, including the mentally retarded, because it would be a violation of the mental retardate's constitutionally afforded rights to treat him or her in a different manner than a person of greater intelligence, ability, social adaptability, and economic productivity.

Rather than institute a sweeping change throughout the nation which will affect each mentally retarded person indiscriminately without regard to his or her particular developmental level and disability, the Petitioners urge this Court to consider that the condition of each mentally retarded person is unique in that he or she may be classified anywhere at a level ranging from a moderate or mild retardate to an individual possessing severely and profoundly retarded characteristics, with each mental retardate needing a different level and degree of treatment and "habilitation services." See J.A. 142-143.

The Respondents' expert, Dr. Roos, testified at trial that mental illness and mental retardation require "entirely different approaches." (J.A. 38). Judge Garwood and the other dissenters who joined with him found this testimony to be significant in raising the issue in their minds as to whether the "presence of difference in approach" is to be treated as "quasi-suspect." (J.A. 141). Judge Garwood went on to state

> It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-

> four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened" scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"? Are we to review as "quasi-suspect" the failure of governmental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared? Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the non-retarded, but where judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded. (emphasis in the original).

(J.A. 141-142).

This Court has had occasion to decide whether the mentally retarded who reside in state institutions have been afforded appropriate treatment. *Youngberg, supra.* This Court determined that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the Courts to specify which of several professionally acceptable choices should have been made." *Youngberg, supra,* 457 U.S. at 321. In holding that this enumerated standard was "lower than the 'compelling' or 'substantial' necessity tests," this Court declined to accord "suspect" or "quasi-suspect" status to

even those mentally retarded individuals who reside in state institutions. *Youngberg, supra*, 457 U.S. at 322. It was the opinion of the Court that requiring the state to meet the "compelling" or "substantial" necessity tests "would place an undue burden on the administration of institutions [for the mentally retarded] . . . and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents." *Youngberg, supra*, 457 U.S. at 322.

As Judge Garwood has suggested, the Fifth Circuit panel's decision to classify all the mentally retarded as a "quasi-suspect" class with attendant "heightened" scrutiny will obviously involve the courts in the issue which will inevitably be raised regarding the adequacy of medical treatment for the mentally retarded. It is important to consider the corollary of these consequences — the federal judiciary's intrusion into the state's regulations regarding the mentally retarded. Judge Garwood determined:

> State regulations will inevitably distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view *a major and unwarranted extension of federal judicial powers*, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. (emphasis supplied).

(J.A. 143).

Furthermore, the Fifth Circuit's decision in the case below will greatly impact the autonomy of state, local and school

authorities to interpret their own legislation. This Court has held in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 969, 971, 102 S.Ct. 3469, 3471 and 3472 (1982) that a school "[b]oard's interpretation of its regulations controls" over a judicial interpretation of the regulations because "federal courts were not authorized to construe school regulations." In holding that the Court of Appeals erred in substituting its own notions for the school board's definition of its rules, this Court in *McCluskey* relied upon its prior holding in *Wood v. Strickland*, 420 U.S. 308, 325, 95 S.Ct. 992, 1002 (1975):

> "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement."

Supra, 458 U.S. at 970. Unless reversed, the Fifth Circuit's decision in the case below will stand as a harbinger of unnecessary and unwarranted judicial interference in state, local and school legislation and the ability of those entities to interpret their own legislation.[27]

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[27]Justice Rehnquist prescribed a caveat for review of the Equal Protection Clause in *Trimble v. Gordon*, 430 U.S. 762, 779, 97 S.Ct. 1459, 1469 (1977):

> [I]n providing the Court with the duty of enforcing such generalities as the Equal Protection Clause, the framers of the Civil War Amendments placed it in the position of Adam in the Garden of Eden. As members of a tripartite institution of government which is responsible to no constituency, and which is held back only by its own sense of self-restraint, . . . we are constantly subjected to the human temptation to hold that any law containing a number of imperfections denies equal protection simply because those who drafted it could have made it fairer or a better law.

III. THE FIFTH CIRCUIT DECISION IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL

In determining whether mentally retarded persons constitute a "quasi-suspect" class, the Fifth Circuit incorrectly characterized the question "as one of first impression" among appellate courts. See J.A. 123. The Fifth Circuit's treatment of what it determined to be a novel issue is, however, contrary to the decision of the Ninth Circuit in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983) and a decision of its own panel in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), both of which held that the handicapped, which includes the mentally retarded, were a non-suspect class for which rational basis level review is appropriate.

In *California Association of the Physically Handicapped*, the plaintiff brought suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Fourteenth Amendment for the FCC's refusal to include the handicapped in its EEO program, arguing that the handicapped should be considered a "suspect" class and that under the strict scrutiny standard applicable to a "suspect" class, the FCC's actions should be held unconstitutional. In applying the rational basis test to distinctions involving non-suspect classifications, the Ninth Circuit unequivocally stated the following:

> No appellate court, however, has held that the handicapped are a suspect class. *Brown v. Sibley*, 650 F.2d 760, 766 (5th Cir. 1981). We decline to be the first.

In *Brown*, which the Ninth Circuit relied on in *California Association of Physically Handicapped*, the Fifth Circuit

panel was likewise presented with a handicapped plaintiff's request for strict judicial scrutiny under the Fourteenth Amendment and review under Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794) of a state agency's policy against the visually impaired working in supervisory positions. The Fifth Circuit held that "the only inquiry is whether [the defendant state agency's] alleged classification scheme 'is rationally related to the [state agency's] objective' " and stated that:

> No Court has ever declared that handicapped persons constitute a suspect class for purposes of equal protection analysis, and we decline to do so today.

Brown, supra, 650 F.2d at 766.

Both the *Brown* and *California Association of Physically Handicapped* cases were brought within the context of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and ruled on the Equal Protection status of handicapped persons as defined by the Rehabilitation Act, which specifically includes mentally retarded persons.[28] The Eighth Circuit has also applied the rational basis level of review to U.S. Civil Service regulations dealing with employment of the mentally retarded. *Fowler, supra.* In *Youngberg*, this Court explicitly refused to apply either a "compelling" or a "substantial" necessity test in evaluating conditions at the Pennhurst State School. *Supra*, 457 U.S. at 322.

Therefore, the decision of the Fifth Circuit panel in this case is novel, not because it is a case of "first impression"

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[28]The Rehabilitation Act, 29 U.S.C. § 706, defines a handicapped individual as:

> . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

but rather because it is at odds not only with the Ninth Circuit and the Fifth Circuit panel in *Brown*, but also because it is contrary to the principles established in *Frontiero, supra*, 411 U.S. at 686. This Court in *Frontiero*, stated that sex is an immutable characteristic and held that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny but carefully distinguished "... sex from such *non-suspect statuses as intelligence or physical disability*" for the reason "that the sex characteristic frequently bears no relation to ability to perform or contribute to society." (emphasis supplied). *Supra*, 411 U.S. at 686.

Furthermore, at the district court level, *Anderson v. Banks*, 520 F.Supp. 472, 512 (S.D. Ga. 1981) held that mentally retarded persons were not a "quasi-suspect" class. Two other district courts have also failed to confer "quasi-suspect" status on mentally retarded persons, even when they are institutionalized, *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365, 371 (D.N.H. 1981) and *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973).

The only district court decision to apply a "heightened" level of scrutiny dealing with mentally retarded persons is *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983), which involved the deplorable conditions at the state school for the mentally retarded. The *Olson* court found that mentally retarded persons failed to satisfy the criteria for "suspect" status; however, the court required the state "to show that the disparities in educational opportunity which exist between the mentally

retarded and other citizens substantially furthers important state interests". *Id.* at 490.

The Eighth Circuit resolved the issues presented in *Olson* under North Dakota law and the Education for All Handicapped Children Act (20 U.S.C. § 1401, *et seq.)* without having to reach any Equal Protection issues regarding the mentally retarded.

It is also important to consider that seven out of the fifteen judges who comprise the Fifth Circuit Court of Appeals dissented from the denial of a rehearing en banc by the other eight members of the Court in the decision below. Six out of the seven dissenters stated that "[t]he panel has made a holding no other federal appellate court has" and found the holding "not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration." (J.A. 139).

In holding that the mentally retarded constitute a "quasi-suspect" class for Equal Protection purposes and that legislation regarding the mentally retarded should be given "intermediate" scrutiny, the panel rejected the position that has either been adopted or supported by the Courts of Appeal which have already considered these matters, and a clear majority of the federal district courts which have ruled on the question to date, as well as this Court's holding in *Frontiero* and *Youngberg.*

This is the first case in which "quasi-suspect" status has been accorded a group and attendant "heightened" or "intermediate" judicial scrutiny has been applied by a Circuit Court of Appeals when the stereotype characteristic does reflect a reality of diminished ability. However, neither the status nor the level of scrutiny are appropriate since

the diminished ability must be taken into consideration and legislatively classified in order to bestow a benefit.

Furthermore, this Court's recent dismissal of the appeal for want of a substantial federal question in *Macon Association for Retarded Citizens, supra,* indicates that the mentally retarded should not be considered "quasi-suspect" nor should "heightened" or "intermediate" scrutiny be applied to test legislation affecting the mentally retarded. One of the questions presented to this Court on appeal was:

> Did Georgia Supreme Court err in applying rational basis test for examining equal protection claim generated by denial of housing permit to home for mentally retarded in that stricter standard of scrutiny should have been applied?

53 U.S.L.W. 3191 (September 25, 1984). The Fifth Circuit's decision in the instant case is in direct conflict with this Court's decision in the *Macon Association for Retarded Citizens* case regarding the level of scrutiny for Equal Protection analysis to be applied to a zoning ordinance which affects mentally retarded persons. This Court's dismissal of the appeal for want of a substantial federal question constitutes a decision on the merits. *Hicks v. Miranda,* 411 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

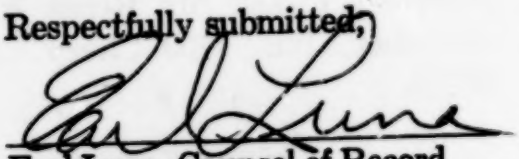
The *Macon Association for Retarded Citizens* case is almost a direct parallel to the case at bar. It involved a zoning resolution (ordinance) that established "permitted" uses and "conditional" uses of the land in each zoning district. The "conditional" use is akin to the special use permit in the present case, which permits the use in certain circumstances after a hearing on the proposed use. The Macon-Bibb County zoning resolution (ordinance) provided for a "conditional" use permit for homes for the men-

tally retarded in certain zoning districts, but not in the single-family residential zoning districts. The Macon Association for Retarded Citizens applied for an amendment to the zoning resolution (ordinance) in order to permit the construction of two group homes for mentally retarded persons in the single-family residential zones. Petitioners before the Supreme Court of Georgia contended that application of the rational relation test for Equal Protection analysis of the ordinance was improper since they asserted that mentally retarded persons constitute at least a "quasi-suspect" class thereby being entitled to a middle-tier level of review. *Macon Association for Retarded Citizens, supra,* 314 S.E. 2d at 220. The Supreme Court of Georgia affirmed the decision of the Georgia Superior Court in its application of the rational relation test to the resolution (ordinance), even though "[i]t is true that the Resolution does contain separate classification for mentally ill or retarded individuals." *Macon Association for Retarded Citizens, supra,* 314 S.E.2d at 221.

CONCLUSION

For these reasons discussed above this Court should declare that the mentally retarded do not constitute a "quasi-suspect" class, the challenged zoning ordinance should be scrutinized at the rational basis level of review, found to be constitutional, as written and as applied, the judgment of the Court of Appeals should be reversed insofar as these issues are concerned and the judgment of the District Court should be affirmed.

Respectfully submitted,



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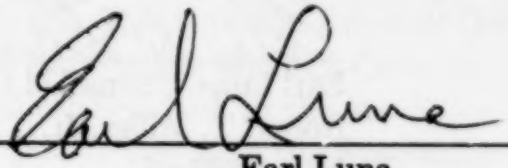
December 26, 1984

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Brief for Petitioners on all parties required to be served by depositing three copies of the Brief for Petitioners in the United States mail, on the 21st day of December, 1984, with first-class postage prepaid addressed to the following counsel of record for Respondents at the address indicated, to-wit: Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 7700 Chevy Chase Drive, Austin, Texas 78752.



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